

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
ASHEVILLE DIVISION**

**CRIMINAL CASE NO. 1:02cr63**

**UNITED STATES OF AMERICA,** )

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)

**vs.**

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**DAVID CLARENCE WARD.** )

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**ORDER**

**THIS MATTER** is before the Court on the Defendant's Motion to Reopen Case Double Jeopardy Count Three of the Sentencing Punishment [Doc. 37].

On July 9, 2002, the Defendant was indicted in a four count Bill of Indictment with bank robbery by force and violence, in violation of 18 U.S.C. §2113(a); armed bank robbery, in violation of 18 U.S.C. §2113(d); using and carrying a firearm during a crime of violence, in violation of 18 U.S.C. §924(c)(1)(A)(ii); and being a felon in possession of a firearm, in violation of 18 U.S.C. §922(g). [Doc. 3]. Each charge stemmed from the robbery of one bank on one day. [Id.].

The Defendant elected to proceed to jury trial and was convicted by jury verdict of each count on November 5, 2002. [Doc. 25]. On February 10, 2003,

the Defendant was sentenced to 130 months imprisonment on Counts One and Two and a term of 120 months on Count Four, all to be served concurrently.<sup>1</sup> [Doc. 30]. He was sentenced to 300 months imprisonment on Count Three to be served consecutively. [Id.]. The Defendant did not appeal his sentence but did appeal a trial court ruling concerning an expert. His conviction and that ruling were affirmed. United States v. Ward, 89 F. App'x. 382 (4<sup>th</sup> Cir.), cert. denied 542 U.S. 910, 124 S.Ct. 2855, 159 L.Ed.2d 278 (2004).

The Defendant did not file a motion pursuant to 28 U.S.C. §2255 to vacate, correct or set aside his sentence. Instead, over eight years after his conviction and sentence became final, he has moved to re-open his case based on double jeopardy. The Defendant argues that Counts Two and Four are the same crime for which he should not have been punished twice. “[C]onviction of the offense under 18 U.S.C. §2113[d] requires proof of elements not required for conviction under 18 U.S.C. §922(g) and vice versa.” United States v. Fox, 941 F.2d 480, 486 (7<sup>th</sup> Cir.), cert. denied 502 U.S. 1102,

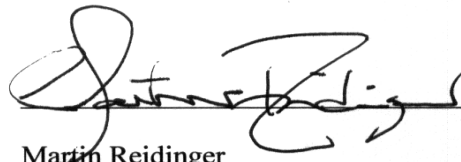
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<sup>1</sup>By sentencing the Defendant on Count One and Count Two concurrently, the sentencing court merged these two counts. United States v. Alston, 56 F.3d 62 (4<sup>th</sup> Cir. 1995). Count One is a lesser included offense of Count Two and thus merging the sentence avoided error. Id.; Jackson v. United States, 2001 WL 34563133 (W.D.N.C.), appeal dismissed 22 F. App'x. 323 (4<sup>th</sup> Cir. 2001).

112 S.Ct. 1190, 117 L.Ed.2d 431 (1992). The elements of the armed bank robbery crime include the taking of money from a federally insured institution by means of force and violence with proof that the bank robber assaulted or put in jeopardy the life of another by use of a dangerous weapon or device. Id. That device, however, need not be a firearm and the crime may be committed by anyone, not just a convicted felon. Id. The Defendant's argument is frivolous.

**IT IS, THEREFORE, ORDERED** that the Defendant's Motion to Reopen Case Double Jeopardy Count Three of the Sentencing Punishment [Doc. 37] is hereby **DENIED**.

Signed: August 2, 2012

  
Martin Reidinger  
United States District Judge

